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No. 87-1384

IN THE

Supreme Court of the United States

October Term, 1987

LAUREL C. THOMAS,
Petitioner,

vs.

WALTER SHIPKA,
In his capacity as Clerk of the
Parma Municipal Court,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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I.

QUESTION PRESENTED FOR REVIEW

Whether a federal court of appeals, in applying *Wilson v. Garcia*, 471 U.S. 261 (1985), to select a single state statute of limitations to apply in actions brought under 42 U.S.C. Section 1983, may choose the state's limitations period for intentional personal injuries.

II.

CORPORATE AFFILIATION

Respondent appears in his official capacity as Clerk of the Parma Municipal Court, an office established under Ohio statutes. However, any judgment assessed against that office as part of the Court's official expenses would be pro rated among the various municipalities served by the Court. The City of Parma, Ohio, would bear the largest share of such allocated expenses. Parma is a municipal corporation.

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The respondent, Walter Shipka, in his official capacity as Clerk of the Parma Municipal Court, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Sixth Circuit's opinions in this case. The opinions are reported at 829 F.2d 570 (1987) and 818 F.2d 496 (1987).

STATEMENT OF THE CASE

Petitioner, Laurel Thomas, was a deputy Clerk in the Parma Municipal Court (Complaint, paragraph 3). On April 7, 1983, she was discharged by respondent Walter Shipka, Clerk of the Court (Complaint, paragraph 15). This action was filed on April 5, 1985, alleging violations under 42 U.S.C. Section 1983 and the Constitution in her being dismissed and the stigma resulting from it (Complaint, paragraphs 19-21).

Shipka filed a Motion to Dismiss on April 29, 1985, asserting *inter alia* a statute of limitations defense, specifically relying on Ohio's one-year intentional tort statute, and citing *Migra v. Warren City School District*, Case No. C80-1183-Y (N.D. Ohio 2/17/81), Slip Op. at 8, *aff'd*, 703 F.2d 564 (6th Cir. 1982), *vacated and remanded on other gds.* 465 U.S. 75 (1984) (Shipka's Motion to Dismiss, at 9). The District Court, in its Order of July 16, 1985, denied the Motion, holding, at 4, that the recent decision by this Court in *Wilson v. Garcia*, 471 U.S. 261 (4/17/85), called for use of Ohio's two-year statute for general negligence claims (Petitioner's Brief, 31a).

On January 17, 1986, Shipka filed a Motion for Summary Judgment, asserting a variety of grounds. On January 28, by way of a Motion for Enlargement of Time to Respond, Mrs. Thomas brought to the District Court's attention both the Sixth Circuit's decision in *Mulligan v. Hazard*, 777 F.2d 340 (11/25/85), *cert. denied*, 106 S. Ct. 2902 (1986), and the decision in *Petrovich v. City of Eastlake*, Case No. C84-1355 (N.D. Ohio, 12/17/85) which, in reliance on *Mulligan*, had dismissed a pending Section 1983 action due to the one-year statute.

In its ruling of January 31, 1986, the District Court reconsidered its prior decision as to the statute of limitations. It held, at 2, that the one-year Ohio assault and battery statute adopted in *Mulligan* compelled dismissal of the Section 1983 cause of action, and at 3, that the same one-year statute barred any direct Constitutional claims (Pet. Br., 34a-35a).

On May 1, 1987, the Sixth Circuit Court of Appeals affirmed that dismissal, confirming that Circuit's commitment to use of the Ohio statute of limitations for assault and battery (Pet. Br., 15a, n.2, 16a-17a). On rehearing, in an opinion dated September 25, 1987, the Court of Appeals reaffirmed the district Court's dismissal and expressly reiterated the continuing effect of its adoption of the assault and battery limitations period for Ohio (Pet. Br., 3a, n.3).

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner has chosen not to contest the Sixth Circuit's decision not to recognize a claim for relief à la *Bivens v. Six Unknown Named Agents*, 403 U.S. 338 (1971) (Pet. Br., 7, n.4). Petitioner has chosen not to contest the Sixth Circuit's decision to give *Wilson v. Garcia*, 471 U.S. 261 (1985), retroactive effect under the facts of this case (Pet. Br., 7, n.5). All that remains for Petitioner to argue then is to question the Sixth Circuit's adoption of the Ohio statute of limitations for assault and battery with respect to Section 1983 claims.

Petitioner points out (Pet. Br., 6), and we agree, that the Sixth Circuit's decision in the case at bar is based, not on any new analysis of the law, but upon its own holding in *Mulligan*, *supra*, decided in the fall of 1985. For all practical purposes then, Petitioner asks the Court to review the decision in *Mulligan*. That request was made before; and this Court has already declined the invitation. *Mulligan v. Hazard*, _____ U.S. _____, 106 S. Ct. 2902.

The Sixth Circuit is not alone in adopting a state statute of limitations applicable to intentional torts. As Petitioner admits, both the Eleventh and Fifth Circuits have followed that course. *Jones v. Preuit & Mauldin*, 763 F.2d 1250 (11th Cir. 1985), *cert. denied*, 474 U.S. 1105 (1986); *Gates v. Spinks*, 771 F.2d 916 (5th Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986). The significant fact, however, is that this Court has undeniably been aware of the divergence of views on this issue in other circuits; yet, repeatedly, this Court has chosen to allow the Circuits to go their separate ways. *See, e.g., County of Wayne v. Carroll*, _____ U.S. _____, 107 S. Ct. 330 (1986); *Jones, supra*, 474 U.S. 1105. Indeed, this Court

has expressly held that national uniformity as to a statute of limitations is not a constitutional requirement. *Board of Regents v. Tomanio,* 446 U.S. 478, 489 (1980).

There has been no change in either the statute itself or the decisions of this Court interpreting 42 U.S.C. Section 1983 which would warrant the Court's exercising its discretionary right of review now.

The only authoritative precedent on this point remains the opinion in *Wilson v. Garcia.* In arriving at the principle that there would be a single statute of limitations in each state, one sounding in tort, that would control Section 1983 actions, this Court made plain its understanding that the historical catalyst for Section 1983 lay in Congress's concern over a "campaign of violence and deception in the South," as expressed through murders, whippings, and lynchings. *Wilson,* 105 S. Ct., 1947. As characterized by this Court, the specific Congressional concern of that day was less with a prison warden losing a prisoner's mail-order hobby kit, *see Parratt v. Taylor,* 451 U.S. 527 (1981), than it was with ending "atrocities." 105 S. Ct., 1948.

In *Wilson,* this Court instructed the Bench and Bar "to select, in each State, the *one* most appropriate statute of limitations for all Section 1983 claims." 105 S. Ct., 1947 (emphasis added). Yes, this Court has indeed acknowledged that a Section 1983 action may arise from negligent conduct; and, yes, a claim may arise from the violation of a federal statute, as Petitioner argues (Pet. Br., 22). But, if the test is what the 42d Congress would have done, 105 S. Ct., 1948, can it really be questioned but that the Congressional intent would undoubtedly have been to select the intentional tort analogy to reflect its overall concerns? Just as this Court relied upon its perception of original Congressional intent to hold that

respondeat superior does not apply to Section 1983 claims but only to actions taken pursuant to official policy or custom, *Monell v. Dept. of Social Services*, 436 U.S. 658, 694 (1978), so, we submit, that the same original Congressional intent would dictate that we employ a limitations period based on official and intentional conduct.

This Court has already spoken on the single issue Petitioner presents, both through the Circuit decisions the Court has knowingly allowed to stand, and through its very clear instructions in *Wilson*. *Mulligan*, and, in turn, the Sixth Circuit's decision herein already accurately reflect those teachings. No purpose would be served by this Court's again going down that road.

CONCLUSION

For these reasons, a writ of certiorari should not be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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